Office-Supreme Court, U.S.
FILED
MAY 7 1981
ALEXANDER L. STEVAS,
CLERK

NO. 80-1697

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

ST. LOUIS SOUTHWESTERN RAILWAY COMPANY
Petitioner,

v.

AARON D. MOSLEY, BILLY J. BUTLER
Respondents.

RESPONSE AND MOTION TO AFFIRM JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Larry R. Daves
Martha McCabe
P. O. Box 1115
Tyler, Texas 75710
(214) 593-0184

Counsel for Respondents

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES CITED	I
OPINIONS BELOW	1
JURISDICTION	1
CONSTITUTIONAL AND REGULATORY PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	4
ARGUMENTS	7
I. The right of access to retained counsel in EEOC negotiated settlement proceedings is protected by implication under the due process clause of the Fifth Amendment	7
II. The Court of Appeals correctly determined that the denial of access to counsel vitiated the effect of the settlement agreement	12
CONCLUSION	15

TABLE OF AUTHORITIES CITED

CASES	Page
Albermarle Paper Co. v. Moody, 422 U.S. 405 (1975)	11
Alexander v. Gardner-Denver, 415 U.S. 36, 44 (1974)	11
Amor v. Wainwright, 604 F.2d 671 (5th Cir. 1979) *cert. denied* 100 S.Ct. 1597	12
Amos Treat & Co. v. Securities & Exchange Commission, 306 F.2d 260 (D.C. Cir. 1962)	12
Brotherhood of Railroad Trainmen v. Virginia, 377 U.S. 1, 7 (1964)	9
Casteneda-Delgado v. Immigration & Naturalization Service, 525 F.2d 1295, 1300 (7th Cir. 1975)	10
Castro-Nuno v. Immigration & Naturalization Service, 577 F.2d 577 (9th Cir. 1978)	10
Chlomas v. U.S. Dept. of Justice, 516 F.2d 310, 313-314 (3rd Cir. 1975)	10

Faretta v. California, 422 U.S. 806, 834, (1975) 13
Goldberg v. Kelly, 397 U.S. 254 (1970) 7
Greene v. McElroy, 360 U.S. 474, 496-497 (1959) 7
Hannah v. Larche, 363 U.S. 420 (1960) 8, 9
Johnson v. Avery, 393 U.S. 483 (1967) 9
Mendez v. Immigration & Naturalization Service, 563 F.2d 956 (9th Cir. 1976) 10
Menechino v. Oswald, 430 F.2d 403 (2nd Cir. 1970) *cert. denied* 400 U.S. 1023 12
N.A.A.C.P. v. Button, 371 U.S. 415, 428-430, 439-440 (1963) . 9
Procunier v. Martinez, 416 U.S. 396 (1974) 9
Sartain v. Securities & Exchange Commission, 601 F.2d 1366, 1376 (9th Cir. 1979) 10
Yiu Fong Cheung v. Immigration & Naturalization Service, 418 F.2d 460, 464 (D.C. Cir. 1969) 10

UNITED STATES CONSTITUTION

Page

Amendment I 9
Amendment V 7, 8, 9

UNITED STATES STATUTUES

5 U.S.C. §555(b) 10, 12
42 U.S.C. §1981 . . . . . 6, 11, 12
42 U.S.C. §2000e 6, 11, 12

FEDERAL RULES OF CIVIL PROCEDURE

Rule 42 (b) 6
Rule 56 6

CODE OF FEDERAL REGULATIONS

29 CFR 1601.19 (c) and (e) 12, 13
29 CFR 1601.20 (a) 12, 13

OTHER AUTHORITIES

Kenneth Culp Davis, *Administrative Law: Cases, Texts Problems* (1977 ed.) pp. 317-319 10
EEOC Compliance Manual § 82 . . . . . 10, 13
EEOC Compliance Manual § 82, Appendix A (b) 10, 12,13

NO._____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

ST. LOUIS SOUTHWESTERN RAILWAY COMPANY
Petitioner,

v.

AARON D. MOSLEY, BILLY J. BUTLER
Respondents.

RESPONSE AND MOTION TO AFFIRM JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Respondents pray that the judgment entered by the United States Court of Appeals for the Fifth Circuit on January 23, 1981 be affirmed, or alternatively that the application for writ of certiorari be denied.

OPINIONS BELOW

The opinion and judgment of the trial court appears in the Appendix of Petitioner's brief at pages A-1 – A-13. The decision of the United States Court of Appeals for the Fifth Circuit is reported at 634 F. 2d 942.

JURISDICTION

This response to the application for certiorari has been timely filed.

CONSTITUTIONAL AND REGULATORY PROVISIONS INVOLVED

United States Constitution, Amendment I

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

United States Constitution, Amendment V:

> No person . . . shall . . . be deprived of life, liberty, or property without due process of law. . .

Administrative Procedure Act, 5 USC §555

> (b) A person compelled to appear in person before an agency or representative thereof is entitled to be accompanied, represented, and advised by counsel or, if permitted by the agency, by other qualified representative.

EEOC Procedural Regulations, 29 CFR §1601.19

> (c) Where the person claiming to be aggrieved fails to provide requested necessary information, fails or refuses to appear or to be available for interviews or conferences as necessary, fails or refuses to provide information requested by the Commission pursuant to §1601.15 (b), or otherwise refuses to cooperate to the extent that the Commission is unable to resolve the charge, and after due notice, the charging party has had 30 days in which to respond, the Commission may dismiss the charge.
>
> (e) Where a respondent has made a settlement offer described in §1601.20 which is in writing and specific in its terms, the Commission may dismiss the charge if the person claiming to be aggrieved refuses to accept the offer: Provided, That the offer would afford full relief for the harm alleged by the person claiming to be aggrieved and

the person claiming to be aggrieved fails to accept such an offer within 30 days after actual notice of the offer.

EEOC Procedural Regulations, 29 CFR §1601.20

(a) Prior to the issuance of a determination as to reasonable cause the Commission may encourage the parties to settle the charge on terms that are mutually agreeable. District Directors, Area Directors, the Director of the Office of Field Services and the Director of the Office of Systemic Programs, or their designees, shall have the authority to sign any settlement agreement which is agreeable to both parties. The Commission shall limit its undertaking in such settlements to an agreement not to process that charge further. Such settlements shall note that the Commission has made no judgment on the merits of the charge. Such an agreement shall not affect the processing of any other charge, including, but not limited to, a Commissioner charge or a charge, the allegations of which are like or related to the individual allegations settled.

EEOC Compliance Manual §82:

(a) General Provisions – Ordinarily, Commission employees should begin to involve charging party's and respondent's attorney once the fact of representation is communicated orally, even though the written statement of representation has not yet been received . . . When charging parties or respondents are represented by counsel, Commission employees should *never* approach such charging parties or respondents without advising counsel by letter or by telephone of the contact as explained below. . .

EEOC Compliance Manual Appendix A to Section 82

6. *Negotiated Settlements* – charging parties' attorney to be contacted prior to contacting charging party with settlement offer.

STATEMENT OF THE CASE

Respondents Aaron Mosley and Billy J. Butler, Black men, were hired by the Petitioner as trainees for the position of Brakeman/Yardman at the Tyler, Texas yard.[1] At the end of a 45-day training period, Respondents and the other trainees were required to take an examination. Respondents were informed that they had failed to pass the examination and were terminated despite their otherwise good work record (Tr. 49). On October 17, 1981, Respondents, without the assistance of counsel, filed formal charges of discrimination in the Dallas Office of the Equal Employment Opportunity Commission (EEOC)[2] (Tr. 72). At all relevant times, the Dallas office was a "test" or "target" office for the EEOC's new rapid-charge processing system (Tr. 41-46), which was implemented in Dallas, Chicago, and Baltimore in partial response to the EEOC backlog.

An EEOC employee, Ms. Celeste Dorsey, notified Respondents of the convening of a fact-finding conference in November, 1978 (Tr. 39). Respondents appeared with counsel. Neither the EEOC representative nor the Petitioner appeared. Respondent's counsel phoned Ms. Dorsey who informed him that she had cancelled the conference because of lack of information (Tr. 8, 39). They discussed resetting the conference and counsel for Respondents informed Ms. Dorsey of his representation of the charging parties (Tr. 40).

Without notice to Respondents' counsel, the conference was re-scheduled for December 5, 1980 (Tr. 40). Respondents notified their counsel at 10:00 a.m. on the morning of December

---

1. The summary of facts is taken from the Findings of Fact and Conclusions of Law made by the District Court (R. 3-13), except when the trial court failed to make a finding and the testimony is uncontroverted. R indicates Record, Tr indicates transcript of the December 5, 1980 hearing.

2. Each respondent's charge alleged four specific instances of discrimination: (1) that he passed the exam; (2) that they were told that all black trainees failed while all caucasion trainees passed; (3) that his classroom grades were otherwise sufficient; and (4) that his job performance was good.

5 of the conference (Tr. 59). Although counsel had a prior judicial commitment at 1:30 p.m. that same day (Tr. 59) he and Respondents appeared between 10:00 and 10:30 a.m. (Tr. 11, 59). Respondents' counsel introduced himself to Ms. Dorsey (Tr. 11, 60). For the first two and one half hours, specialist Dorsey privately reviewed information with a representative of Petitioner (Tr. 11-12, 35). After the Commission specialist had determined that the Petitioner was willing to settle the charges, she went back into the hallway to bring Respondent Butler into the room to discuss the settlement offer. Ms. Dorsey testified that Respondents' counsel was not present, (Tr. 14) but both Respondent Butler and his counsel testified that the attorney was still in the hallway (Tr. 60, 73). The Court did not make a finding on the disputed testimony but found that Ms. Dorsey was unaware of counsel's continued availability.

Ms. Dorsey discussed the proposed settlement with Respondents individually and together. According to her testimony she told them that the settlement offer was the most she could get from the Petitioner, that it was "the best [she] could get for them." (Tr. 34). When they indicated they were uncomfortable about signing and asked about meeting with their attorney, the EEOC representative told them their attorney did not need to be there for them to sign, but that if they didn't sign the agreement, then the fact-finding conference would be re-scheduled. (Tr. 12, 15, 52). She told them that "there had been a case where a charging party was charged attorney's fees" and that under the right to sue they could hire an attorney if they so desired after the commission had issued a determination (Tr. 52, 53). As a result, Respondent Butler thought that it was "a hopeless case" and that "there was very little that could be done" (Tr. 74).

The actual fact-finding conference never began (Tr. 51). While counsel was still absent, Respondents signed the agreement, between 3:00 and 3:30 p.m. (Tr. 51). The EEOC specialist never reviewed the merits of the case (Tr. 35, 36). She did not know,

therefore, if the test which was administered to Respondents had been validated or had a disparate impact on Black applicants and trainees (Tr. 37-38).

Immediately following the conference, Respondents conferred with counsel. On December 6, 1978, Respondents executed and filed a second charge of discrimination against Petitioner (Tr. 55, 57). In addition to the original charges, Respondents complained that the non-validated tests had a racially discriminatory impact on them and other black employees.

On December 6, 1978, the Deputy Director of the EEOC's Dallas Office formally approved the "agreements" executed on December 5, 1978 (Tr. 22, 23). On December 15, 1978, the EEOC issued Respondents' Notice of Right To Sue (Tr. 55, 57). Respondents filed this action on March 1, 1979, pursuant to the Act and 42 U.S.C. §1981, Civil Rights Act of 1866. Therein Respondents complained about the allegedly racially discriminatory testing, discharge, promotion, and job placement practices and policies of the company and challenged their discharge.

A hearing was held on February 15, 1980, to determine whether the negotiated settlement constituted a bar to suit.[3] The Court found that the execution of the settlement agreement was done "knowingly and voluntarily".[4]

The Court made oral findings of fact and conclusions of law (Tr. 82). He later adopted defendant's proposed findings and conclusions, (R 3-11) and Judgment (R 2).

---

3. The Petitioner proceeded at the hearing on its Motion for Summary Judgment, filed pursuant to Rule 56 of the F.R.C.P. The Court's Findings of Facts and Conclusions of Law, however, recited that the hearing was also conducted under Rule 42 (b).

4. Respondents on appeal challenged this ultimate finding by the District Court and the subsidiary findings upon which this conclusion was based (Appellant's Brief at 23-28).

ARGUMENT

I. The right to access to retained counsel in EEOC negotiated settlement proceedings is protected by implication under the due process clause of the Fifth Amendment.

The decision below is in accord with this Court's decisions defining the applicability of due process requirements to administrative proceedings. In *Goldberg v. Kelly*, 397 U.S. 254 (1970) this Court held that procedural due process requires that a pretermination evidentiary hearing be conducted when an agency discontinues public assistance payments to welfare recipients. Further this Court emphasized the importance of the right to counsel stating that "the right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel." 397 U.S. 270. Thus, in the context of adjudicative administrative proceedings, the right to retained counsel is established.

In *Greene v. McElroy*, 360 U.S. 474, 496-497 (1959), this Court noted:

> Certain principles have remained relatively immutable in our jurisprudence. One of these is that where government action seriously injures an individual, and the reasonableness of the action depends on fact-findings, the evidence used to prove the government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue. While this is important in the case of documentary evidence, it is even more important where the evidence consists of individuals whose memory may be faulty or who, in fact, might be perjurers or persons motivated by malice, vindictiveness, intolerance, prejudice, or jealousy. We have formalized these protections in the requirements of confrontation and cross-examination. They have ancient roots. They find expression in the Sixth Amendment. . .This Court has been zealous to protect these rights from erosion. It has spoken out not only in criminal cases... but also in all types of cases where administrative and regulatory actions were under scrutiny.

regulatory actions were under scrutiny.

Petitioner argues that a constitutional right to counsel has not been implicated herein because the EEOC fact-finding proceedings are investigatory, not adjudicatory. In fact, if Respondents were challenging simply the EEOC fact-finding procedures[5], then Respondents would agree that Fifth Amendment rights are not implicated, as those are purely investigatory proceedings.

However, Respondents suggest that the EEOC negotiated-settlement procedures, as opposed to the fact-finding processes, do implicate Fifth Amendment rights. Support for this proposition may be found in the authorities relied upon by petitioner. In *Hannah v. Larche*, 363 U.S. 420 (1960), Justice Warren, writing the majority opinion stated:

> As is apparent from this brief sketch of the statutory duties imposed upon the Commission, its function is purely investigative and fact-finding. It does not adjudicate. It does not hold trials or determine anyone's civil or criminal liability. It does not issue orders. Nor does it indict, punish, or impose any legal sanctions. It does not make determinations depriving anyone of his life, liberty, or property. In short, the Commission does not and cannot take any affirmative action which will affect an individual's legal rights. The only purpose of its existence is to find facts which may subsequently be used as the bases for legislative or executive action.
>
> 363 U.S. 440-441.

Although the negotiated settlement process does not involve a formal adjudication, the process, if successful, affects the com-

---

5. The EEOC guidelines preclude counsel from participating in the fact-finding conference except in an advisory capacity. Attorneys are not allowed to cross-examine, speak for parties or take an active role in the conference.

plainant's legal right to redress grievances in Court. The legal right to petition the courts for redress of grievances is a fundamental right. Access to the Courts is protected by the United States Constitution. *See Procunier v. Martinez*, 416 U.S. 396 (1974); *Johnson v. Avery*, 393 U.S. 483 (1967). Moreover even the fact-finding process itself results in determinations of "cause" or "no cause", unlike the process described in *Hannah* which was purely investigatory. Also the EEOC has authority under the 1972 amendments to proceed in federal court itself on charges of discrimination.

Furthermore, the First Amendment protects the right to assemble or associate with counsel for the purpose of redressing grievances in the Courts. *See N.A.A.C.P. v. Button*, 371 U.S. 415, 428-430, 439-440 (1963). *Brotherhood of Railroad Trainmen v. Virginia*, 377 U.S. 1, 7 (1964). Thus, unlike the process described in *Hannah*, the EEOC negotiated-settlement processes do affect the legal rights of the parties.

The right of access to counsel is implicitly protected by the due process clause of the Fifth Amendment. Justice Frankfurter in the concurring opinion in *Hannah* defines due process as follows:

> Whether the scheme satisified those strivings for justice which due process guarantees, must be judged in light of reason drawn from the considerations of fairness that reflect our traditions of legal and political thought, duly related to the public interest Congress sought to meet by this legislation as against the hazards or hardship to the individual that the Commission procedure would entail. 363 U.S. at 487.

Whether the due process clause of the Fifth Amendment protects Respondents' access to retained counsel in EEOC settlement proceedings may be determined then by analyzing the content of applicable procedural regulations, guidelines and law, the public interest involved in vindicating rights protected by Title VII, and the impact of the Commission's procedures upon Respondents.

Both the Administrative Procedure Act, 5 U.S.C. §555(b), and the EEOC Compliance Manual recognize the right of witnesses in administrative proceedings to be represented by retained counsel.[6] The EEOC Compliance Manual provides that "the charging party's attorney [should] be contacted prior to contacting [the] charging party with [a] settlement offer." EEOC Compliance Manual, App. to §82, Item 6.[7]

Therefore, existing administrative regulations, judicial precedents, and internal EEOC guidelines recognize the party's right during administrative processes to access to counsel. Access to counsel in administrative proceedings has been recognized by the Circuit Courts. *See Yiu Fong Cheung v. Immigration & Naturalization Service*, 418 F. 2d 460, 464 (D.C. Cir. 1969); *Chlomas v. U.S. Dept. of Justice*, 516 F. 2d 310, 313-314 (3rd Cir. 1975); *Casteneda-Delgado v. Immigration & Naturalization Service*, 525 F. 2d 1295, 1300 (7th Cir. 1975); *Mendez v. Immigration & Naturalization Service*, 563 F. 2d 956 (9th Cir. 1976); *Sartain v. Securities & Exchange Commission*, 601 F. 2d 1366, 1376 (9th Cir. 1979); *Castro-Nuno v. Immigration & Naturalization Service*, 577 F. 2d 577 (9th Cir. 1978). As a general rule, administrative procedures recognize a right to counsel when a person is compelled to appear or is a "party" to a proceeding[8].

---

6. Section (b) of the Administrative Procedure Act 5 U.S.C. §555 provides in pertinent part:

> "A person compelled to appear in person before an agency or representative thereof is entitled to be accompanied, represented, and advised by counsel or, if permitted by the agency, by other qualified representative."

7. Moreover, the manual states:

> "When charging parties or respondents are represented by counsel, Commission employees should *never* approach such charging parties or respondents without advising counsel by letter or by telephone of the contact as explained below. . ."
>
> EEOC Compliance Manual §82(a)

8. *See* Kenneth Culp Davis, *Administrative Law: Cases, Texts, Problems* (1977 ed.) pp. 317-319.

What is the public interest which Congress sought to meet by enactment of Title VII of the Civil Rights Act of 1964? One purpose is to achieve "cooperation and voluntary compliance" through encouraging conciliation to resolve alleged violations of Title VII. *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 44 (1974). There is no doubt that the adoption of the negotiated-settlement and fact-finding procedures in the Fall of 1977 has resulted in decreasing a substantial backlog of charges, has expedited the handling of new charges of discrimination and increased the number of conciliations. Adoption of the new procedures, therefore, is consistent with the Congressional policy of encouraging conciliation as "the preferred means" to resolve alleged violations of the Act. *Alexander v. Gardner-Denver Co.*, *supra* at 44.

At stake herein, however, is an equally important public interest in eradicating discrimination and making persons whole for injuries suffered as a result of discrimination. *See, e.g., Albermarle Paper Co. v. Moody,* 422 U.S. 405 (1975). The EEOC, perhaps recognizing the potential for tension between the "preferred means" of conciliation by negotiated settlement, and the public interest in eliminating discriminatory practices and their consequences, promulgated guidelines and regulations protecting the right of both charging parties and employers to retain counsel and be represented by counsel.

The settlement arrived at as a result of the process challenged herein neither eliminates a discriminatory practice nor makes the claimant whole. As Judge Johnson states:

> This is not a case in which plaintiffs' claims are patently frivolous. Represented by knowledgeable counsel, plaintiffs therefore would not be expected to bargain away their claims for insubstantial relief. Yet, the settlement terms offered by defendant did not even purport to address plaintiffs' claims of employment discrimination; indeed, they amounted to precious little more than a promise of non-retaliation against plaintiffs—a duty dependent not upon any contractual relationship, but arising from the provisions of Title VII. 42 U.S.C. §2000e3. (A-22)

Finally, Petitioner contends below in its argument-in-chief that the settlement bars not only a suit on the negotiated charge but also on the §1981 suit and Title VII charge subsequently filed challenging the validity and impact of the test. If Petitioner prevailed in this argument, the legal consequences of the denial of access to counsel would be disastrous for Respondents. Having already been persuaded to sign a "settlement agreement" in which Petitioner promises only what the law requires, Respondents would then be barred from seeking meaningful relief in the courts. Due process is clearly required where a government agency makes a binding determination—or engineers a settlement—which directly affects the legal rights of individuals. *Amos Treat & Co. v. Securities Exchange Commission,* 306 F. 2d 260 (D.C. Cir. 1962); *Menechino v. Oswald,* 430 F. 2d 403 (2nd Cir. 1970), *certiorari denied* 400 U.S. 1023. And due process includes the right of access to the courts. *Amor v. Wainwright,* 604 F. 2d 671, (5th Cir. 1979), *certiorari denied* 100 S. Ct. 1597.

Thus, current notions of fairness as manifested by the Administrative Procedure Act, regulations, Commission guidelines and administrative law decisions support protecting the right of access to counsel in EEOC settlement proceedings. The tension between the public interest in conciliation and the interest in vindication and eradication of unlawful employment practices is best realized by allowing aggrieved parties access to retained counsel. The specific, potential injury to uncounseled complainants outweighs the general societal interest in encouraging conciliation when accomplished at the expense of depriving complainants of meaningful relief.

II. The Court of Appeals correctly determined that the denial of access to counsel vitiated the effect of the settlement agreement.

The trial court concluded not only that the settlement agreement was signed knowingly and voluntarily (A-9), but also that Respondents were not denied access to counsel (A-5). These findings were challenged by Respondents below at pp. 23-28 of their brief.

The district court made subsidiary findings that (1) the EEOC specialist was not aware of the continued presence of counsel in the hallway; (2) counsel made no objection to the investigator's speaking alone with Respondent; and (3) neither Respondent objected to the absence of counsel or asked to be allowed to discuss the proposed settlement with counsel. Respondents submit that whether the specialist in fact was aware of counsel's presence is irrelevant in light of her affirmative duty under the EEOC guidelines to notify counsel "prior to contacting the charging party with [a] settlement offer." See E.E.O.C. Compliance Manual, App. to §82, Item 6. Moreover, the specialist failed to notify counsel, although she had actual notice of his representation[9] of the December 5th conference.

In connection with the finding that counsel made no objection, the right of assistance of counsel is held by and may only be waived by the person entitled to representation, not by the attorney. *See Faretta v. California,* 422 U.S. 806, 834 (1975). The specialist testified that the Respondents were reluctant about signing and specifically stated that "they had to have their attorney present to sign the agreement[s]." (Tr. 15) The investigator responded that "they did not have to have their attorney to sign the agreement." (Tr. 15)

Thus, the trial court's finding that the Respondents did not object to the absence of counsel is not supported by the record.

As a result of the denial of access to counsel, the settlement was not signed voluntarily and knowingly. Immediately after sign-

---

9. The specialist admitted discussing counsel's representation following her cancellation of the fact-finding conference in November. She claimed she did not notify counsel of the December 5, 1978 conference because there was no letter in the file confirming the representation. The Manual, however, specifically provides at §82 (a):

> "Commission employees should begin to involve the charging party's attorney once the fact of representation is communicated orally, even though the written statement has not been received."

Respondents suggest that the specialist was trying to force a settlement.

ing the instruments, Respondents contacted counsel and filed additional charges of discrimination against the company. The EEOC specialist erred in refusing to honor Respondents' request to consult with their retained counsel (Tr. 19). By representing to the Respondents that the settlement was the best she could get for them and by implication threatening Respondents with an obligation to pay attorney's fees should they not prevail, the EEOC "forced" a settlement which was neither knowing nor voluntary.

Thus, an affirmance in this case would not open the court house doors to a flood of litigation. At Footnote 5 of Judge Sam Johnson's opinion, therein the Court specifically limited the holding to the instant dispute:

> We do not hold that employment discrimination claimants unrepresented by counsel are incompetent to enter binding settlement agreements, nor that a settlement agreement may be avoided if a claimant later demonstrates that he or she settled for less than might otherwise have been obtained through litigation (A-21).

CONCLUSION

For these reasons, Respondents request this Court to affirm the judgment of the United States Court of Appeals for the Fifth Circuit or, alternatively, to deny the application for writ or certiorari.

Respectfully submitted,

DAVES & McCABE
420 South Vine
P.O. Box 1115
Tyler, Texas 75710

by: _____
Larry R. Daves

_____
Martha McCabe

ON THE PAPERS:

Susan M. Bernard,
Law Clerk